

PAUL R. CORT, State Bar No. 184336  
IRENE V. GUTIERREZ, State Bar No. 252927  
Earthjustice  
50 California Street  
San Francisco, CA 94111  
pcort@earthjustice.org  
igutierrez@earthjustice.org  
Tel: 415-217-2000/Fax: 415-217-2040

Attorneys for Plaintiffs Sierra Club,  
American Lung Association,  
Environmental Defense Fund,  
and Natural Resources Defense Council

UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA  
SAN FRANCISCO/OAKLAND DIVISION

SIERRA CLUB, AMERICAN LUNG  
ASSOCIATION, ENVIROMENTAL DEFENSE  
FUND, and NATURAL RESOURCES DEFENSE  
COUNCIL

Plaintiffs,

v.

UNITED STATES ENVIRONMENTAL  
PROTECTION AGENCY; BOB PERCIASEPE, in  
his official capacity as Acting Administrator of the  
United States Environmental Protection Agency,

Defendants.

Case No: 13

2809

**COMPLAINT FOR DECLARATORY AND  
INJUNCTIVE RELIEF**

(Clean Air Act, 42 U.S.C. §§ 7401 *et seq.*)

**INTRODUCTION**

1. Ozone pollution, also referred to as smog, is responsible for a number of serious health impacts, from aggravating asthma and other breathing problems, to low birth weight in babies, to increasing the risk of premature death.

2. The federal Clean Air Act directs the United States Environmental Protection Agency ("EPA") to establish national ambient air quality standards to protect public health and welfare by defining the maximum concentrations of certain pollutants allowed in our air.

COMPLAINT

1  
2  
3  
4  
5  
6  
7  
8  
9  
0  
1  
2  
3  
4  
5  
6  
7  
8  
9  
0  
1  
2  
3  
4  
5  
6  
7  
8

3  
4  
5

6  
7

8  
9  
0

## 11

12  
13  
14  
15

16  
17  
18  
19  
20

21  
22  
23  
24  
25

26  
27  
28

**PARTIES**

11. Plaintiff Sierra Club, a corporation organized and existing under the laws of the State of California, is a national nonprofit organization whose mission is to protect the wild places of the earth, promote the responsible use of the earth's ecosystems and resources, and protect and restore the quality of the natural and human environment. Sierra Club is headquartered in San Francisco, California.

12. Plaintiff American Lung Association ("ALA"), a corporation organized and existing under the laws of the State of Maine, is a national nonprofit organization dedicated to the conquest of lung disease and the promotion of lung health. ALA is headquartered in Washington, D.C.

13. Plaintiff Environmental Defense Fund ("EDF"), a corporation organized and existing under the laws of the State of New York, is a national nonprofit organization whose mission is to preserve the natural systems on which all life depends and to find practical and lasting solutions to the most serious environmental problems. EDF is headquartered in New York, New York.

14. Plaintiff Natural Resources Defense Council ("NRDC"), a corporation organized and existing under the laws of the State of New York, is a national nonprofit organization whose purpose is to safeguard the Earth, and its people, flora, fauna and natural ecosystems. NRDC is headquartered in New York, New York.

15. Plaintiffs' members live, work, recreate and conduct other activities in areas where their health and welfare are adversely affected or threatened by ozone pollution.

16. The acts and omissions of EPA complained of herein cause injury to Plaintiffs and their members by delaying review of the national ozone standards beyond the deadline set by the Clean Air Act. This delay injures Plaintiffs' members by allowing air quality conditions that impair or threaten members' health and welfare to persist, and by nullifying or delaying measures mandated by the Act to protect members' health and welfare from ozone pollution. The health, recreational, aesthetic, and environmental interests of Plaintiffs' members have been and continue to be adversely affected by the acts and omissions of EPA.

17. The acts and omissions of EPA alleged herein further deprive Plaintiffs and their members of procedural rights and protections to which they would otherwise be entitled, including,

1 but not limited to, the right to comment on, and judicially challenge, EPA action retaining or  
2 revising the national ambient air quality standards for ozone.

3 18. For all the foregoing reasons, the failures complained of herein cause Plaintiffs and  
4 their members injuries for which they have no adequate remedy at law. Granting the requested relief  
5 would redress these injuries.

6 19. Defendant EPA is the federal agency charged with implementation of the Clean Air  
7 Act, including the promulgation of national ambient air quality standards for ozone.

8 20. Defendant Bob Perciasepe is the Acting Administrator of the United States  
9 Environmental Protection Agency, and is responsible for implementation and enforcement of the  
10 Clean Air Act. Defendant Perciasepe is sued in his official capacity, and officially resides in  
11 Washington, D.C.

## 12 **BACKGROUND AND FACTS**

### 13 **Ozone Pollution**

14 21. Ozone, while necessary in the upper atmosphere to block ultraviolet radiation from  
15 the sun, is a corrosive air pollutant that is harmful to humans and other living organisms.

16 22. Ground-level ozone, commonly referred to as smog, forms when volatile organic  
17 compounds ("VOC") react with nitrogen oxides ("NOx") in the presence of heat and sunlight. VOC  
18 and NOx emissions originate from a wide variety of sources including large industrial sources, cars,  
19 trucks, and other fuel-burning activities.

20 23. Exposure to ozone can cause a number of acute and chronic health effects. Ozone  
21 impairs lung function, aggravates asthma, and has been linked with increases in school absences,  
22 emergency department visits, and hospital admissions. Studies have shown that exposure to ozone  
23 increases the risk of heart attacks and hospital admission for other cardiovascular conditions, and  
24 increases the risk of low birth weight in babies. Exposure to ozone has also been correlated with  
25 increased risk of death for those suffering from cardiopulmonary conditions.

26 24. Certain groups are especially vulnerable to ozone exposure, such as those with  
27 existing lung diseases, children, the elderly, and outdoor workers and athletes. These vulnerable  
28

1 groups constitute a significant portion of the population, and consequently, the proper regulation of  
2 ozone has significant implications for public health throughout the United States.

3 25. Ozone pollution has also been tied to negative impacts on vegetation and ecosystems,  
4 as well as rising temperatures.

### 5 **The Clean Air Act's Requirements for National Ambient Air Quality Standards**

6 26. The Act establishes a comprehensive scheme "to protect and enhance the quality of  
7 the Nation's air resources so as to promote the public health and welfare and the productive capacity  
8 of its population." 42 U.S.C. § 7401(b)(1).

9 27. As one of its central features, the Act requires the Administrator to set national  
10 ambient air quality standards for certain air pollutants. 42 U.S.C. § 7409(a). Under the Act, the  
11 Administrator must set "primary" standards for those pollutants at levels that will protect the public  
12 health with an adequate margin of safety, *id.* § 7409(b)(1), and "secondary" standards at levels that  
13 will "protect the public welfare from any known or anticipated adverse effects associated with the  
14 presence of those pollutants in the ambient air." *Id.* § 7409(b)(2).

15 28. The Clean Air Act imposes on EPA a non-discretionary duty to review national  
16 ambient air quality standards every five years and "make such revisions in such criteria and  
17 standards and promulgate such new standards as may be appropriate . . . ." 42 U.S.C. § 7409(d)(1).

### 18 **EPA's Duty Under the Clean Air Act to Review the** 19 **National Ambient Air Quality Standards for Ozone**

20 29. EPA last promulgated national ambient air quality standards for ozone on March 12,  
21 2008. *See* 73 Fed. Reg. 16436 (Mar. 27, 2008).

22 30. Shortly after these regulations were promulgated, EPA's Clean Air Scientific  
23 Advisory Committee sent EPA a letter stating its strong disagreement with EPA's primary and  
24 secondary ozone standards, which it contended failed to provide an adequate margin of safety, and  
25 were not supported by the best available science. *See* 75 Fed. Reg. 2938, 2943 (Jan. 19, 2010).

26 31. The 2008 ozone standards were also challenged in litigation brought by a range of  
27 groups, including states, public health organizations, and environmental groups. 75 Fed. Reg. at  
28

9444. This litigation was held in abeyance, so that EPA could initiate a rulemaking to reconsider the primary and secondary ozone standards. *Id.*

32. In 2010, EPA proposed to revise national ozone standards to address the deficiencies identified by EPA's Scientific Advisory Committee, as well as to incorporate information from recent scientific studies. 75 Fed. Reg. at 2993. The EPA Administrator determined that the 2008 primary ozone standard of 0.075 parts per million ("ppm") was "not sufficient to provide protection with an adequate margin of safety." 75 Fed. Reg. at 2996. EPA proposed revising the 8-hour primary ozone standard to within a range of 0.060 to 0.070 ppm. *Id.* at 2998. EPA also proposed that the secondary ozone standard should be set separately from the primary standard, according to a "cumulative, seasonal standard." *Id.* at 2999.

33. Despite the Administrator's conclusion that the 2008 ozone standards were inadequate to protect public health and welfare, in 2011, the President directed EPA to set aside the 2010 proposed rule, and withhold review of the 2008 standards until March 2013 – the five-year deadline for completing review of the national ambient air quality standards under 42 U.S.C. § 7409(d)(1).

34. Pursuant to 42 U.S.C. § 7409(d)(1), EPA was required to review the 2008 ozone standards and adopt any final rulemaking revising those standards before March 28, 2013.

35. To date, however, EPA has failed to complete review of the national ozone standards according to the statutory timetable, and has yet to issue even a new proposed rule.

## **FIRST CLAIM FOR RELIEF**

### **Failure to Review the National Ambient Air Quality Standards for Ozone**

#### **By the Statutory Deadline**

36. Plaintiffs hereby incorporate all previous paragraphs by reference.

37. Defendants have failed to fulfill their duty under 42 U.S.C. § 7409(d)(1) to review the national ambient air quality standards for ozone, promulgated on March 12, 2008 and published in the Federal Register on March 27, 2008, within five years.

38. Defendants' failure to timely review the ozone standards constitutes a failure to perform an act or duty that is not discretionary within the meaning of 42 U.S.C. § 7604(a)(2).

39. Defendants' failure to perform this nondiscretionary duty is ongoing. Plaintiffs are informed and believe that the omissions complained of herein will continue unless enjoined by order of this Court.

40. Accordingly, Plaintiffs are entitled to an order from this Court compelling Defendants to complete the required review of the national ambient air quality standards for ozone.

**RELIEF REQUESTED**

41. WHEREFORE, Plaintiffs pray that this Court:

(a) Declare that Defendants' failure to act as complained of herein constitutes a failure to perform a nondiscretionary duty required by 42 U.S.C. § 7409(d)(1), and within the meaning of 42 U.S.C. § 7604(a)(2);

(b) Preliminarily and permanently enjoin EPA and the Administrator from continuing to violate the above-described nondiscretionary duties;

(c) Order Defendants to take final action completing the required review no later than September 30, 2014;

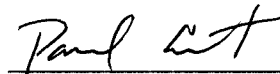
(d) Award Plaintiffs their reasonable costs of litigation, including attorneys' fees, pursuant to 42 U.S.C. § 7604(d);

(e) Retain jurisdiction over this action to ensure compliance with the Court's orders; and;

(f) Grant such other relief as the Court deems just and proper.

DATED: June 19, 2013

Respectfully submitted,



PAUL R. CORT, State Bar No. 184336  
IRENE V. GUTIERREZ, State Bar No. 252927  
Earthjustice  
50 California Street  
San Francisco, CA 94111  
pcort@earthjustice.org  
igutierrez@earthjustice.org  
Tel: 415-217-2000/Fax: 415-217-2040

*Counsel for Plaintiffs*